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IN THE

Supreme Court of the United States

October Term, 1962
No. 45

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California, EDMUND G. BROWN, Governor of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellees.

On Appeal From the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' PETITION FOR REHEARING.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Admission of Evidence.

It is respectfully submitted that a grievous burden is unjustifiedly imposed on the appellants by the judgment of the court if in truth there is abundant evidence in the record on this appeal, properly available for consideration by this court, that interstate commerce is impermissibly restricted by application of Sec. 792 of California's Agricultural Code to debar from sale in that state avocados grown in Florida which of their nature have less than 8% oil content but are nevertheless

mature and wholesome. Appellants therefore entreat the court, as a preliminary to appraisal of the grounds of this petition, again to scan the record on appeal in order to determine what evidence is properly before the court as a basis for adjudication of appellants' complaint.

As stated by the court, only one witness for the appellants testified at the trial held February 7 and 8, 1961 in Sacramento. Four other witnesses for appellants testified by depositions taken in Miami on January 21 and 22, 1958, namely, David M. Biggar, Dr. Roy W. Harkness, Harold E. Kendall and Fred Piowaty [R. 144-332; also Pltf. Exs. 1 to 22 identified by these witnesses, R. 353-445] and it is apparent that no effect is given to this testimony in the opinion of the court. It is said that this testimony was not "formally admitted" and that "For this court to reverse and order an injunction on the basis of that evidence would be, in effect, to admit the contested depositions and exhibits on appeal without ever affording the appellees an opportunity to argue their seemingly substantial objections" (p. 23).*

*Footnote 21, appurtenant to the quoted sentence, does not call attention to any of appellees' objections to the admissibility of the depositions or any of the exhibits. Instead, it refers to evidentiary matter injected into appellees' post-trial brief, designated as an "offer of proof," alleged to show that the oil tests of Florida avocados made by Dr. Harkness did not reveal the full oil content of the fruit. [R. 707-708, 748-756.] Manifestly, the argument based on this unsworn evidentiary matter, with no opportunity for cross-examination or submission of counter-testimony, was not an objection to the *admissibility* of the testimony of Dr. Harkness, in whole or in part. In contrast, Dr. Harkness was cross-examined at length by counsel for appellees regarding the oil tests of avocados made at the University of Florida Sub-Tropical Experiment Station, the method used and the accuracy of the results. [R. 219-247, particularly pp. 243-246.]

Appellants respectfully submit that notwithstanding informality in the trial proceedings, or ambiguity in the record because of certain statements made by members of the trial court, or because of the post-trial "Ruling on evidentiary matters," appellants' depositions and exhibits form part of the evidence properly to be considered and acted upon by this court. Attention is directed, in particular, to the following incidents in the trial court proceedings:

R. 575-576: Appellants' depositions offered in evidence; request by appellees' counsel that the depositions be read, stating that "We have a written memorandum prepared outlining objections to each proposed item. We have objections to many of the answers as being hearsay." Response by presiding judge: "We will mark the depositions in evidence and we will reserve ruling on the objections that you have filed when we have had a chance to examine them."*

R. 576: Exhibit identified by Dr. Harding marked Plaintiffs' 23 for identification, following the last exhibit number in the depositions.

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*It is to be noted that the only objection ever made to the depositions in entirety was that no proof was made that the witnesses were at a greater distance than 100 miles from the place of trial. [R. 706, 726-727.] Aside from judicial knowledge that the distance between Sacramento and towns south of Miami is more than 100 miles, the record shows that the depositions were taken pursuant to stipulation and were initially invoked by appellees on their motion to dismiss the complaint filed March 14, 1958. [R. 60-61, 98-99.] As to the specific objections, appellees were afforded unrestricted opportunity to present and argue all objections to the depositions, at the time and in the manner directed by the court. It is not suggested that reading of depositions line by line in open court is a prerequisite formality to admission in evidence.

R. 603: Plaintiffs' Exhibits 23, 24, 25 and 26, identified by Dr. Harding, offered in evidence; ruling reserved.

R. 683: Discussion of the transcript of the evidence to be furnished to the court, statement by Judge Halbert: "All of the testimony and all of the stipulations and all of the references to evidence should be written up and transcribed by the reporter, but no documents nor printed material (need) be included in that record. It can be referred to as an exhibit. Now, as to the documents that have been received by way of depositions, they may be considered read into the record, but need not be transcribed for the purpose of this record by the reporter." Mr. Fourt: "No, your honor. We have reserved our right to object to each sentence as it is read into the record." Judge Halbert: "I understand that, and furthermore there is no sense in copying this book here again into the record," referring to the printed record on the prior appeal in this case, containing the full text of the depositions and annexed exhibits.

R. 685: Mr. Fourt: "Do I understand, sir, that the depositions are not now in evidence and that if the court desires to read them there will be another hearing?" Judge Goodman: "They are all in evidence subject to your objections and the court will rule on them when it makes its ruling in the case if it is necessary."

Thus, at the termination of the hearing, there is reiteration of the ruling that the depositions are in evidence, both by Judge Halbert [R. 683] and by Judge Goodman. [R. 685.] There is the statement, in var-

ious forms, that the court has received appellees' written objections to the depositions and appellants' exhibits, to be argued in the post-trial briefs and to be ruled on if deemed necessary. Counsel for appellees acquiesced in this procedure. [R. 685.]

R. 700-756: In the post-trial briefs of the parties, extensive argument was submitted on appellees' objections to the admissibility of the depositions, also plaintiffs' Exhibits 1 to 22 forming part of the depositions and plaintiffs' Exhibits 23 to 26 submitted as part of the testimony of Dr. Harding. Only appellees' argument appears in the printed record on appeal.*

R. 758: Then follows the declaration in the court's Memorandum and Order of July 10, 1961: "The court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the court has reserved its ruling. * * * We will assume, *arguendo,* that the exhibits and depositions offered by plaintiffs are all admissible." Certainly there is nothing in this declaration to cancel the rulings made at the trial admitting appellants' depositions and exhibits in evidence. Quite the contrary, it is appellees' objections, not any part of the challenged evidence, that is thus summarily swept aside.

That the court chose to make a wholesale disposition of appellees' reserved objections to the admissibility of evidence by an assumption of admissibility, in lieu of a series of specific rulings on each challenged item, does not change the effect of the court's action. The

*Appellants' answer to appellees' objections is not included in the printed record for the obvious reason that there were no rulings on admissibility of evidence to be reviewed.

challenged evidence, appellants submit, remained part of the record of the case for such consideration as the trial court might deem essential.

It is manifest that the court's action was not due to a determination that the challenged evidence was rendered immaterial by some principle of law, since both the court's opinion and the challenged evidence deal with the same subject matter, that is, the oil content of the Florida avocados in relation to California's 8% oil content requirement. The fact that appellees' counsel chose to ignore the challenged evidence in his argument on this appeal, as stated in the opinion of this court (p. 22), either because of an assumption that the evidence was not admitted or for any other reason, seems immaterial.

R. 782: We come, finally, to the anomalous and self-contradictory post-trial "Ruling on evidentiary matters" made on the same date as the "Findings of fact," "Conclusions of law," and "Judgment." The "ruling" is that all of the depositions and all of appellants' exhibits are not admitted in evidence, but have been considered by the court as an offer of proof. No "offer of proof" was ever made by appellants of this evidence, or any item thereof. There was no rejection of evidence calling for an "offer of proof." The fiction of an "offer of proof" was contrived in a lame attempt to account for the fact that the challenged evidence was held available for consideration by the court in passing upon the case, notwithstanding appellees' reserved objections. It was not in truth non-admitted evidence, as the record of the trial proceedings clearly shows, no matter how cavalierly dealt with by the court.

There is, indeed, ambiguity in the self-annulling post-trial "ruling on evidence." But to penalize the appellants for this ambiguity by sending the case back for what may be a needless new trial, rather than to disregard the ambiguity as immaterial, seems a harsh miscarriage of justice. On the other hand, no injustice to appellees is involved in a reconsideration of the case by this court in the light of all the evidence actually admitted and available for consideration by the trial court. Appellees, although first demurring, acquiesced in the disposition of their objections in the manner chosen by the court. [R. 576, 683-685.] At no time was counsel for appellees restricted in cross-examination of appellants' witnesses, or in the introduction of evidence aimed to meet the oral and documentary evidence introduced by appellants. In fact, much of the evidence introduced by appellees was of its nature intended to detract from the force of what is now asserted to be non-admitted evidence.*

*The entire testimony of Presley Wiggs [R. 663-675], Albert C. Jones [R. 675-679], S. R. Whipple [R. 679-681], at least in part the testimony of Dr. David Appleman [R. 647-663], Defendants' Exhibit E [R. 488-492.]. In the opinion of this court (p. 19, footnote 17) quotation is made from the deposition of R. M. Wimbish [R. 332-351], taken by appellees at the same time and place and under the same stipulation as appellants' depositions, to the effect that the regulations under the Florida avocado marketing agreement are made by the Avocado Administrative Committee. The quotation is preceded by a parenthetical statement that the court did not rule on the admissibility of the Wimbish deposition. The record indicates that the offer of the depositions made by appellants was taken to include the Wimbish deposition as well as the four other depositions and that the ruling admitting the depositions subject to later consideration of appellees' objections was applicable to the Wimbish deposition. [R. 575-576, 684, 685.] If this were not the understanding,

When the court arrived at its decision upon the assumption that all of the challenged evidence was admissible, thus shunting aside all of appellees' reserved objections, appellees acquiesced in this disposition of their objections by failing to press the objections to the point of specific rulings on each item and thereby permitted the objections to lapse.* The post-trial asseration that the challenged evidence, *in toto*, was not admitted, in face of the reiterated rulings at the trial to the contrary, was in no sense a ruling on any of appellees' objections, already disposed of by assumption of admissibility. That the assumption was said to be made "*arguendo*" left it none the less in full effect, since it was not followed by rulings sustaining any of the objections. Had there been such rulings, appellants could have sought opportunity to introduce other evidence that would have cured the objections, or other evidence to replace evidence that might be ruled inadmissible.

Appellants submit, accordingly, that this court is not obligated to heed appellees' lapsed objections to appellants' evidence in the consideration of the issues

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appellees would not have filed and argued objections to the Wimbish deposition. [R. 700, 726-727.]

Incidentally, the quotation from the Wimbish deposition overlooks the fact that the Avocado Administrative Committee announcement and enforcement of regulations followed issuance of the regulations by the Secretary of Agriculture and publication in the Federal Register.

**Clauson v. United States*, 8 Cir., 60 F. 2d 604, headnote 4; *Grove Laboratories v. Brewer & Co.*, 1 Cir., 103 F. 2d 175, 178; *Dale Benz, Inc. v. American Casualty Co.*, 9 Cir. 305 F. 2d 641, 642-643; *Clopton v. Clopton*, 162 Cal. 27, 121 Pac. 720, 722; *De Tray v. Higgins*, 31 Cal. App 2d 482, 88 P. 2d 241, 243-244; *Wilson v. Dalton's Adm'r.*, 311 Ky. 285, 223 S. W. 2d 978, 981.

on this appeal; that all of the evidence made part of the record in the trial court, and there given such attention as the court deemed worthy, is properly before this court for such consideration as the court may deem pertinent to the issues to be adjudicated; that otherwise fundamental questions of constitutionality may be decided upon fallacious declarations of fact, to the detriment of the national welfare as well as to appellants.

GROUNDS FOR REHEARING.

I.

The holding that appellants have not sustained their claim that debarment from sale in California of Avocados grown in Florida, by application of section 792 of the agricultural code of California, after certification of the Florida fruit as of requisite maturity and quality for interstate commerce under the federal marketing agreement act, fails to give due effect to the Supremacy Clause of the United States Constitution.

Appellants presume to add to the dissenting opinion only a reminder to the court of the enormous scope and importance of the marketing agreement role in the national program to protect and promote agriculture. (Appellants' Jurisdictional Statement, p. 14.) Establishment of maturity and quality standards to govern the interstate marketing of agricultural products is a special feature of many of the federal marketing agreements—the sole component of the Florida avocado agreement as adopted in 1954. To permit California to hold for naught the federal regulation of interstate marketing of the Florida avocados, well over 90% of

which must be marketed outside the state if the industry is to survive, is to undermine the effectiveness of a most vital national program.

To suggest that conflict between the federal regulation and the state regulation is not inevitable, that the rejections of Florida avocados in California might have been avoided by leaving the fruit on the trees beyond the earliest picking dates permitted by the federal regulations, and that "Nothing in the record contradicts that suggestion," is indeed astonishing. First, the record shows without contradiction that because of the 8% oil requirement substantially all of the Florida avocados shipped to California were of but one variety out of the 40-plus varieties grown in Florida, namely, the Lula variety; that no period of waiting beyond the commencement of the normal marketing period could have qualified any appreciable portion of other leading varieties for sale in California, notably the hybrid Booth 8S and Booth 7S [accounting respectively for 27.24% and 12.95% of the 1959-1960 crop, R. 492]; that of the Lula avocados shipped to California, large loads were rejected on dates a month to two months after the commencement of the normal marketing period for this variety [R. 438, 443]; that the oil content tests of Lula avocados made at the University of Florida Sub-Tropical Experiment Station in Homestead to ascertain whether shipments to California might be ventured continued to show less than 8% oil content five to eight weeks after the earliest permitted picking dates [R. 371-378]; that the hundreds of oil tests of Lula avocados made by Dr. Harkness, in his research project on avocado maturity standards, showed predominantly less than 8% oil content all through November

and into December [R. 389-437, summarized in Appellants' Brief at p. 15]; that the oil tests of more than 5,000 avocados made particularly in the 1955-1956 season by Dr. Harding and his staff at the research station of the United States Department of Agriculture at Miami shows incidentally the amount of the oil content of the leading varieties of Florida avocados in relation to the earliest permissible picking dates and demonstrates that practically none of the great number of avocados tested attained 8% oil content until well past the earliest picking dates. [R. 479-485, summarized in appellants' brief at pp. 23-29.]*

There is not a word of evidence that any of the Florida avocados, at the time permitted to be marketed under federal regulations, were then in truth immature or otherwise prone to deceive potential consumers in California. Yet by the decision of this court the officers of California are authorized to ban these avocados from sale in California until, if ever, they attain 8% oil content. Such second test of maturity cannot be characterized as "higher" than that imposed under federal law in the absence of evidence impugning the integrity of the federal certification of maturity. Overlooked in the court's opinion is the fact that appellees withdrew their defense that the standards of quality and maturity promulgated under the Florida avocado marketing order, and the methods and procedures used in the administration thereof, are unreasonable, arbitrary and invalid. [R. 119, 571.]

To limit the inevitability of conflict between the federal and state regulation to the West Indian vari-

*See also the oral testimony of Dr. Harding at R. 619-620; also of Harold Kendall at R. 269-272.

eties of the Florida avocados, and then to palliate this measure of conflict by declaring this portion of the Florida crop unmerchantable in California, is not only factually untenable (Appellants' Brief, pp. 35-38, 63-64), but also introduces into the Supremacy Clause a tolerance that leaves it flaccid. The Supremacy Clause, it is most earnestly urged, was hardly intended to be so pliant.

II.

There is ample evidence in the record on this appeal, properly to be considered by the court, that application of section 792 of the agricultural code of California to bar sale in that state of avocados produced in Florida, solely on the ground that such avocados have less than 8% oil content, unreasonably restricts and discriminates against interstate commerce.

Appellants submit that upon re-examination of the record, particularly the comprehensive data showing the oil content of the avocados grown in Florida in relation to the California 8% oil requirement (summarized in Appellants' Brief at pp. 10-34, 62-69), it will become apparent that a new trial is not needed to make a determination of appellants' complaint under the Commerce Clause of the Constitution.

To cite but one illustration, it is noted in the court's opinion, by reference to an affidavit made March 3, 1958 by S. R. Whipple, Chief of the Bureau of Fruit and Vegetable Standardization in the California Department of Agriculture, that out of a total of 230,100 flats of avocados shipped from Florida to California from October 1, 1954 to December 31, 1957,

6.4% were rejected because they failed to pass the 8% oil test. [R. 79-81.] This is by no means the full measure of the exclusion of the Florida avocados from the California market by application of the 8% oil test. Far more significant is the fact that the shipments of Florida avocados to California in the period mentioned in the affidavit amounted only to about 3.8% of the total shipments of Florida avocados in the same period.* This indicates the drastic extent to which the 8% oil requirement has barred the Florida avocados from the most favorable market for this fruit in the United States—the state in which about as many avocados are consumed as in all the other states together. (Appellants' Brief, pp. 19-20.)

Appellants submit that it is unjust to impose upon them—in the sixth year of this lawsuit and upon second appeal to this court—the further burden and delay of a new trial to reintroduce evidence to prove what is overwhelmingly established by evidence available for consideration on this appeal; that neither use of the equivocal word "*arguendo*" in the opinion of the District Court, nor the fanciful post-trial pronouncement that substantially all of appellants' evidence is "not admitted," although actually received in evidence and made part of the record subject to objections never ruled upon, stands in the way of consideration of this evidence upon this appeal.

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*The record shows the total shipments of Florida avocados in the last three of the crop seasons mentioned in the affidavit, as follows: 516,103 bushels in the 1955-56 season, 439,419 bushels in the 1956-57 season, 364,616 bushels in the 1957-58 season to December 28, 1957 [R. 357, 362, 368], equivalent to 4,620,483 flats [at 3½ flats per bushels, R. 502] as against the total of 171,600 flats said to have been shipped to California in this period.

III.

The court's holding that application of California's 8% oil standard of maturity to the avocados imported from Florida is not a denial of the equal protection of the laws fails to give effect to the evidence that this standard is discriminatory when applied as a determinant of the maturity of avocados that of their nature attain maturity with less than 8% oil content.

The fact that the 8% oil standard is applied to the avocados grown in California, as well as those grown in Florida, and that in some past years California growers have experienced difficulty in meeting the oil test (Opinion, footnote 19), does not negate the discriminatory effect of application of the oil standard to the Florida avocados. The basis of judgment, it is submitted, is the practical effect of the challenged standard in relation to present-day circumstances and horticultural science.

In footnote 19 of the court's opinion, reference is made to statements that in some past years the 8% oil standard has resulted in rejection of shipments of California avocados. In more recent years, by new plantings, two varieties of California avocados—the Fuerte and Hass, both of very high oil content [R. 660]—have come to account for 80% or more of the California crop, while many of the varieties extant in earlier years are no longer produced commercially. If California growers of some varieties of avocados still have difficulty in meeting the 8% oil test, this does not militate against the right of the growers of Florida avocados to market their fruit promptly upon attainment of

maturity by a standard appropriate to the nature of the fruit, not a standard without horticultural validity in application to this fruit. [R. 618-620.]

Conclusion.

Upon the grounds aforesaid, appellants petition the court to grant a rehearing of their appeal, and upon such rehearing to adjudge that appellants are entitled to the relief prayed in their complaint.

Respectfully submitted,

ISAAC E. FERGUSON,
Attorney for Appellants.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.
May 29, 1963.

ISAAC E. FERGUSON,
Counsel for Appellants.